

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

UNITED STATES,

v.

JOSE ORTIZ.

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Cr. No. C-00-407

**ORDER GRANTING DEFENDANT’S MOTION TO PROCEED
ON APPEAL *IN FORMA PAUPERIS* AND GRANTING
DEFENDANT’S MOTION FOR APPOINTMENT OF COUNSEL**

Pending before the Court are two motions by Defendant Jose Ortiz (“Ortiz”) related to his appeal of the Court’s judgment of revocation: (1) Ortiz’s September 24, 2007 motion for appointment of counsel on appeal (D.E. 74); and (2) his motion to proceed on appeal *in forma pauperis*, received by the Clerk on October 12, 2007. (D.E. 77.) For the reasons set forth herein, the Court GRANTS his motion for appointment of counsel and his motion to proceed on appeal *in forma pauperis*.

I. BACKGROUND

Defendant Jose Ortiz (“Ortiz”) was originally sentenced in this case on November 22, 2002 to five years probation, a \$750 fine and a \$100 special assessment. Judgement was entered November 27, 2002. (D.E. 53.) On April 27, 2005, Ortiz was indicted in Cr. No. C-05-257(1) and charged with conspiracy to possess with intent to distribute marijuana. (Cr. No. C-05-257, D.E. 1.) In June 2006, the Probation Department petitioned this Court to issue a warrant to begin revocation proceedings in this case, based on his charges in Cr. C-05-257 as well as a number of other alleged law violations and alleged failures to abide by his terms of supervision. (D.E. 55.)

On September 12, 2007, the Court revoked Ortiz’s supervised release in the instant case and sentenced him to 36 months in the custody of the Bureau of Prisons, to be followed by a five-year

supervised release term, both to run consecutive to his sentence in Cr. No. C-05-257. (D.E. 71, 73.) On the same date, the Court sentenced Ortiz in Cr. No. C-05-257 to 110 months in the custody of the Bureau of Prisons, to be followed by a five-year supervised release term, both to run consecutive to his sentence in the instant case, and also imposed a \$1,000 fine and \$100 special assessment. (Cr. No. C-05-257, D.E. 65, 66.) Ortiz was represented at sentencing in both cases by retained counsel, Jesus Maria Alvarez.

Ortiz filed a timely notice of appeal in the instant case, but did not appeal his conviction or sentence in Cr. C-05-257. (D.E. 74.) Ortiz has also filed two motions now pending before the Court. Specifically, he requests the appointment of counsel to represent him on appeal and also requests leave to proceed on appeal *in forma pauperis*.

II. ANALYSIS

In support of his motions, Ortiz has filed an affidavit of indigency. Although it does not contain a certification by Ortiz's prison as to any amounts in his inmate account, such information is not required to determine whether Ortiz is eligible for appointed counsel. See Pena v. United States, 122 F.3d 3, 3 (5th Cir. 1997) (defendants bringing direct criminal appeals are not subject to Prison Litigation Reform Act). Rather, a defendant is entitled to appointed counsel if they are "financially unable to obtain counsel." 18 U.S.C. § 3006A(b). Thus, Ortiz is not required to show that he is indigent, but only that he is financially unable to afford counsel.

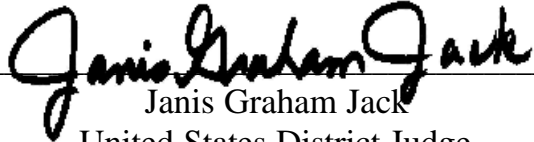
Ortiz has been in federal custody since being arrested on April 10, 2006. Thus, he has not been employed since that time. In his sworn financial affidavit submitted to the Court, Ortiz states he is not currently employed in prison, that he has no assets, no checking or savings accounts, and that his sole income is approximately \$250 per month that he receives from his wife. In reviewing both his financial affidavit and the Presentence Investigation Report for Ortiz in Cr. No. C-05-257 prepared

prior to his September 2007 sentencing (see PSR at ¶¶ 55-67 (setting forth Ortiz's employment record and financial condition)), the Court concludes that Ortiz has shown he is financially unable to afford the costs of an appeal and to afford counsel. Accordingly, Ortiz's motion to proceed *in forma pauperis* is GRANTED. Additionally, Ortiz's motion for appointment of counsel is GRANTED.

III. CONCLUSION

For the foregoing reasons, Ortiz's motions for appointment of counsel and to proceed on appeal *in forma pauperis* (D.E. 74, 77) are GRANTED. Ortiz's counsel in the revocation proceedings, Jesus Maria Alvarez, 501 N. Britton Avenue, Rio Grande City, Texas 78582, is hereby appointed to represent Ortiz on appeal.

It is ORDERED this 19th day of October, 2007.


Janis Graham Jack
United States District Judge